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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

SHERI LYNN NACE,

Plaintiff,

v.

**CAROLYN W. COLVIN,
Acting Commissioner of Social
Security,**

Defendant.

NO. EDCV 14-00641-MAN

**MEMORANDUM OPINION
AND ORDER**

INTRODUCTION

Plaintiff filed a Complaint on April 9, 2014, seeking review of the denial of plaintiff's application for disability insurance benefits ("DIB"). On May 13, 2013, the parties consented, pursuant to 28 U.S.C. § 636(c), to proceed before the undersigned United States Magistrate Judge. (Dkt. Nos. 7, 10.) On March 16, 2015, the parties filed a Joint Stipulation ("Joint Stip.") in which plaintiff seeks an order reversing the Commissioner's decision and either remanding the matter for further administrative proceedings or ordering the payment of benefits. (Joint Stip. at 26.) The Commissioner requests that the ALJ's decision be affirmed or, in the alternative, that the case be remanded for further proceedings. (*Id.* at 26-27.) The Court has taken the matter

1 under submission without oral argument.

2
3 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**
4

5 On February 10, 2011, plaintiff, then 49 years old,¹ applied for a period of disability and
6 DIB. (Administrative Record ("A.R.") 157.) Plaintiff had filed a prior application for benefits, which
7 the Commissioner denied in September 2009. (*Id.* 73.)
8

9 Plaintiff alleged disability commencing August 1, 2006, due to bipolar disorder, mood
10 swings, mood disorder, and hand tremors. (A.R. 157, 189.) Plaintiff had previously worked as
11 a teacher's aide. (*Id.* 18, 181.)
12

13 The Commissioner denied plaintiff's application initially (A.R. 62-70) and on reconsideration
14 (*id.* 72-83). On April 17, 2012, plaintiff requested a hearing. (*Id.* 101.) On December 27, 2012,
15 plaintiff, who was represented by counsel, testified before Administrative Law Judge Lynn
16 Ginsburg ("ALJ"). (*Id.* 25-53.) Ronald Hatakeyama, a vocational expert ("VE"), also testified. (*Id.*
17 53-60; *see also id.* 146.) On January 18, 2013, the ALJ issued an unfavorable decision denying
18 plaintiff's claim for DIB. (*Id.* 10-20.) On February 12, 2013, the Appeals Council denied plaintiff's
19 request for review. (*Id.* 1-3.)
20

21 **SUMMARY OF ADMINISTRATIVE DECISION**
22

23 The ALJ found that plaintiff had not engaged in substantial gainful activity from the alleged
24 onset date of August 1, 2006, through her date last insured on December 31, 2011. (A.R. 12.)
25 The ALJ further found that, through the date last insured, plaintiff had the following severe
26

27 ¹ Plaintiff was born on May 27, 1961 (A.R. 157.) Accordingly, plaintiff turned 50 -- and
28 entered the closely approaching advanced age category -- between the date of her application and
December 31, 2011, the date she was last insured. *See* 20 C.F.R. § 404.1563.

1 impairments: bipolar disorder; hypertension; fine hand tremor; and polysubstance abuse in an
 2 unknown state of remission. (*Id.*) The ALJ also concluded that plaintiff's impairments do not
 3 satisfy the requirements of a listed impairment in 20 C.F.R. part 404, subpart P, appendix 1 (20
 4 C.F.R. §§ 404.1520(d), 404.1525, 404.1526).² (*Id.* 12-13.)

5
 6 The ALJ determined that, through the date last insured, plaintiff had the residual functional
 7 capacity ("RFC") to perform medium work with the following limitations:

8
 9 [Plaintiff] can lift and/or carry 50 pounds occasionally and 25 pounds frequently; she
 10 can stand and/or walk for six hours out of an eight-hour workday with regular
 11 breaks; she can sit for six hours out of an eight-hour workday with regular breaks;
 12 she cannot climb ladders, ropes or scaffolds; she is precluded from jobs requiring
 13 exposure to unprotected heights and the use of moving hazardous machinery; she
 14 is limited to simple, routine and repetitive tasks; she requires a work environment
 15 free of fast paced production requirements; she requires a job with simple work
 16 related decisions, superficial to no interaction with the public and occasional contact
 17 with coworkers; and [she] is limited to occasional bilateral fine manipulation.

18
 19 (A.R. 13-14.) The ALJ found that through the date last insured, plaintiff was unable to perform
 20 her past relevant work as a teacher's aide but could have performed other jobs that exist in
 21 significant numbers in the national economy, including the jobs of kitchen helper (DOT 318.687-
 22 010), industrial cleaner (DOT 381.687-018), and linen room attendant (DOT 222.387-030). (*Id.*
 23 18-19.) Accordingly, the ALJ found that plaintiff was not disabled. (*Id.* 19.)

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 25 \\
 26 _____

27 ² In reaching this conclusion, the ALJ expressly considered whether plaintiff met the
 28 criteria of listings 12.06 for anxiety-related disorders and 12.09 for substance addiction disorders.
 (A.R. 13.)

STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's decision to determine whether it is free from legal error and supported by substantial evidence in the record as a whole. *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007). "Substantial evidence is 'more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Gutierrez v. Comm'r of Soc. Sec.*, 740 F.3d 519, 522-23 (9th Cir. 2014) (internal citations omitted). "Even when the evidence is susceptible to more than one rational interpretation, we must uphold the ALJ's findings if they are supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674 F.3d 1104, 1110 (9th Cir. 2012).

Although this Court cannot substitute its discretion for that of the Commissioner, the Court nonetheless must review the record as a whole, "weighing both the evidence that supports and the evidence that detracts from the [Commissioner's] conclusion." *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (internal quotation marks and citation omitted); *Desrosiers v. Sec'y of Health and Hum. Servs.*, 846 F.2d 573, 576 (9th Cir. 1988). "The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and for resolving ambiguities." *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995).

The Court will uphold the Commissioner's decision when the evidence is susceptible to more than one rational interpretation. *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005). However, the Court may review only the reasons stated by the ALJ in his decision "and may not affirm the ALJ on a ground upon which he did not rely." *Orn*, 495 F.3d at 630; *see also* *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003). The Court will not reverse the Commissioner's decision if it is based on harmless error, which exists only when it is "clear from the record that an ALJ's error was 'inconsequential to the ultimate nondisability determination.'" *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 885 (9th Cir. 2006) (quoting *Stout v. Comm'r of Soc. Sec.*, 454 F.3d

1 1050, 1055 (9th Cir. 2006)); *see also Carmickle v. Comm’r of Soc. Sec.*, 533 F.3d 1155, 1162 (9th
2 Cir. 2008).

3 4 **DISCUSSION**

5
6 Plaintiff alleges that the ALJ committed the following three errors: (1) she improperly
7 evaluated the opinion of plaintiff’s treating psychiatrist (Joint Stip. at 17-21); (2) she improperly
8 evaluated the opinion of the examining physician (*id.* 11-14); and (3) she improperly relied on
9 VE’s testimony that conflicted with the DOT (*id.* 3-8).

10 11 **I. The ALJ Properly Evaluated The Opinion Of Plaintiff’s Treating** 12 **Psychiatrist.**

13
14 On May 2, 2006, Dr. Rajendra Patel, plaintiff’s attending psychiatrist during her
15 hospitalization at Canyon Ridge Hospital, completed a form requested by plaintiff’s health
16 insurance company.³ (A.R. 286-87.) Dr. Patel stated that plaintiff required treatment for
17 symptoms including mood swings, suicidal thoughts, and difficulty concentrating. (*Id.* 286.) Dr.
18 Patel opined that plaintiff was “unable to function” between March 28, 2006, the date these
19 symptoms first appeared, and April 26, 2006, and in terms of an eight-hour workday, plaintiff’s
20 symptoms rendered her “incapable of minimal activity or sedentary work.” (*Id.* 286.) Dr. Patel
21 assessed plaintiff with a GAF score of 50,⁴ indicating serious symptoms, and diagnosed plaintiff
22 with bipolar disorder, moderate, and polysubstance dependence. (*Id.* (listing plaintiff’s DSM-IV
23 axes as 296.62 for axis I and 204.80 for axis II).) Dr. Patel stated that, during that one-month
24 period, plaintiff attended day treatment two to three times per week. (*Id.*) Dr. Patel last saw
25

26 ³ It is unclear from the record whether Dr. Patel completed the form in connection with
a health insurance claim or a claim for long term disability insurance. (*See generally* A.R. 286-87.)

27 ⁴ A GAF score between 41 and 50 denotes “[s]erious symptoms (e.g., suicidal ideation,
28 severe obsessional rituals, frequent shoplifting) OR any serious impairment in social, occupational,
or school functioning (e.g., no friends, unable to keep a job). DSM-IV 34.

1 plaintiff for treatment on April 11, 2006, the same date of plaintiff's last comprehensive exam,
2 according to the form completed by Dr. Patel. (*Id.*) On February 10, 2011, plaintiff applied for
3 a period of disability and DIB, alleging disability commencing a full three months after the one-
4 month period of treatment described by Dr. Patel. (*See id.* 157.)

5
6 The ALJ assigned Dr. Patel's opinion "little weight," because: it was not supported by
7 objective evidence; it was inconsistent with the record as whole; Dr. Patel did not provide an
8 explanation for the opinion rendered; Dr. Patel did not identify any specific functional limitations
9 that prevented plaintiff from working; and Dr. Patel identified a period of disability that did not
10 meet the twelve-month durational requirement of the Social Security regulations. (A.R. 16.) The
11 ALJ's reasons for according little weight to Dr. Patel's opinion are legally sufficient and do not
12 warrant reversal.

13
14 When a treating or examining physician's opinion is not contradicted by another physician,
15 it may be rejected only for "clear and convincing" reasons that are supported by substantial
16 evidence. Ghanim v. Colvin, 763 F.3d 1154, 1160-61 (9th Cir. 2014); Lester v. Chater, 81 F.3d
17 821, 830 (9th Cir. 1995). When it is contradicted by another doctor's opinion, a treating or
18 examining physician's opinion may be rejected only if, after considering the factors set out in 20
19 C.F.R. § 404.1527(c)(2)-(6) for evaluating medical opinions, the ALJ articulates "specific and
20 legitimate" reasons supported by substantial evidence in the record. Garrison, 759 F.3d 995, 1012
21 (9th Cir. 2014); Orn, 495 F.3d at 632.

22
23 Although Dr. Patel is the only medical source who opined that plaintiff's mental impairments
24 rendered her unable to function, this opinion was limited to the one-month period in which
25 plaintiff received treatment at the Canyon Ridge Hospital (from March 28, 2006, through April 26,
26 2006) and assessed no functional limitations that would adversely affect plaintiff's ability to work
27 after that period. (A.R. 386.) Accordingly, the ALJ correctly determined that Dr. Patel's opinion
28 was not controlling on the question of disability, because it did not address plaintiff's ability to

1 perform substantial gainful activity over the course of a 12-month period. See 42 U.S.C. §
2 423(d)(1)(A).

3
4 In addition, the ALJ correctly observed that the medical record as a whole was inconsistent
5 with plaintiff's position that her inability to function while under Dr. Patel's care continued after
6 she stopped receiving treatment at Canyon Ridge Hospital. First, plaintiff's sparse treatment
7 records show that, following her release from Dr. Patel's care, plaintiff did not seek psychiatric
8 treatment again for five years. (A.R. 304-12 (6/10/11 rapid psychiatric evaluation at Riverside
9 County Hospital).) She also received psychiatric treatment only once between the date of the
10 alleged onset of her disability (August 1, 2006) and the date on which she was last insured
11 (December 31, 2011) (*id.*) and only occasionally sought psychiatric treatment thereafter (*id.* 397-
12 98 (7/19/12 rapid psychiatric evaluation at Riverside County Hospital), 367 (8/30/12 mental health
13 assessment with the Riverside County Department of Health's Main Street Clinic)). Second,
14 plaintiff's treatment records show that no medical source assessed severe functional limitations,
15 which would preclude her from working in the period between the date plaintiff's disability
16 allegedly began and her date last insured. (See A.R. 302-312 (6/10/12 rapid psychiatric
17 evaluation at Riverside County Hospital - plaintiff demonstrated "good" attention, memory,
18 judgment, insight, and impulse control, diagnosed with bipolar disorder, prescribed Wellbutrin,
19 Topamax, Lamictal, and Benadryl, discharged with instructions avoid street drug and alcohol use);
20 *see also id.* 397-89 (7/19/12 - rapid psychiatric evaluation at Riverside County Hospital - plaintiff
21 demonstrated calm and cooperative behavior, clear and coherent speech, appropriate affect, goal
22 directed thought process, "good" attention and concentration, average intelligence, and "fair"
23 memory, judgment, insight, and impulse control and adjustments were made to her prescribed
24 medication).)

25
26 The opinions of the two examining psychiatrists, Dr. Reynaldo Abejuela, a diplomate of the
27 American Board of Psychiatry and Neurology, and Dr. Thaworn Rathana-Nakintara, a board eligible
28 psychiatrist, are also inconsistent with plaintiff's position that her inability to function throughout

1 her alleged period of disability. On June 23, 2011, Dr. Abejuela examined plaintiff at the
2 Commissioner's request. Plaintiff described her symptoms as: difficulty concentrating; racing
3 thoughts; problems with sleep, appetite, weight, and memory; impulsivity; and spending sprees.
4 (A.R. 320-21.) Plaintiff also reported a history of alcohol, marijuana, and methamphetamine
5 abuse. (*Id.* 321.) Dr. Abejuela administered a series of tests and found that plaintiff could
6 remember 3/3 items after three and five minutes, do "serial 3s and 7s," and simple math but
7 could not correctly name either the last president of the United States or the capital of the United
8 States. (*Id.* 323-24.) He diagnosed her with ADHD, bipolar disorder NOS, substance induced
9 mood disorder, and polysubstance dependence in remission. (*Id.* 324.) He found that plaintiff's
10 reasoning and comprehension were intact and her cognitive functioning within normal limits. (*Id.*
11 325.) He further found that plaintiff had mild impairments in: concentration, persistence, and
12 pace; social functioning; understanding, carrying out, and remembering complex instructions;
13 responding appropriately to coworkers, supervisors, and the public; responding appropriately to
14 usual work situations; and dealing with changes in a routine work setting. (*Id.* 325-26.) He
15 identified no restriction in plaintiff's ability to understand, carry out, and remember simple
16 instructions and perform daily activities, and he found no repeated episodes of emotional
17 deterioration in work-like settings. (*Id.* 325.) Dr. Abejuela opined that, if plaintiff complied with
18 her medication regime and abstained from street drugs and alcohol, her psychiatric symptoms
19 would "abate in the next few months." (*Id.* 326.)
20

21 On February 13, 2012, Dr. Rathana-Nakintara, a board eligible psychiatrist, examined
22 plaintiff and reached the same conclusion. Plaintiff told Dr. Rathana-Nakintara that she was
23 "emotional," "severely manic most of the time," "easily irritated, impulsive, and distracted," and
24 has a "short temper." (A.R. 348.) She reported that she has used methamphetamine and
25 marijuana since the age of 18 until the present time. (*Id.* 349.) After a series of tests, Dr.
26 Rathana-Nakintara observed that plaintiff: registered 3 out of 3 items at 0 minutes and 3 out of
27 3 items at 5 minutes; did "well" on serial 3s subtraction but asked for a paper and pencil to do
28 serial 7s subtraction; spelled the word "world" forward and backward; identified the current

1 president of the United States, as well as two past presidents; identified the capitals of the United
2 States and California; and responded appropriately to imaginary situations requiring social
3 judgment and knowledge of norms. (*Id.* 350-51.) Dr. Rathana-Nakintara diagnosed plaintiff with
4 mood disorder NOS and polysubstance dependence, amphetamine and cannabis, and assessed
5 her with a GAF score of 65,⁵ indicating mild symptoms. (*Id.* 351.) He found that plaintiff
6 exhibited no difficulty: interacting with the clinic staff or himself; maintaining composure;
7 maintaining even temperament; and maintaining social functioning. (*Id.* 351.) Additionally, he
8 found that plaintiff "can focus and maintain attention" and "has no difficulties in concentration,
9 persistence, and pace." (*Id.* 351.) He opined that plaintiff would have no limitations: performing
10 both simple and repetitive tasks and detailed and complex tasks; completing a normal workday
11 or work week; accepting instructions from supervisors; and interacting with coworkers and the
12 public. (*Id.* 351.) Accordingly, he stated that plaintiff was able to perform work activities on a
13 consistent basis without special or additional supervision and could handle the usual stresses,
14 changes, and demands of gainful employment. (*Id.* 351.) Like Dr. Abejuela, Dr. Rathana-
15 Nakintara concluded that "[i]f [plaintiff] were totally abstinent from methamphetamine and
16 marijuana, there would be no limitations at all." (*Id.* 352.)

17
18 Thus, the record plainly shows that: (1) plaintiff had a one-month period of
19 decompensation in 2006, during which she was treated by Dr. Patel and "unable to function"; and
20 (2) in the period between the date of plaintiff's release from Dr. Patel's care and the date on
21 which she was last insured, no psychiatrist or other medical source opined that plaintiff's mental
22 impairment precluded her from, or severely limited her ability to, work. Instead, two psychiatrists,
23 Dr. Abejuela and Dr. Rathana-Nakintara, agreed that, if plaintiff abstained from illegal street drugs
24 and alcohol, she would have no functional limitations at all. Accordingly, the ALJ did not err in
25 finding that Dr. Patel's opinion, regarding plaintiff's inability to function in March and April 2006,
26 was not a controlling opinion on the ultimate question of disability and assigning it little weight.

27
28 ⁵ A GAF score of 65 indicates some mild symptoms or difficulty in social, occupational, or
school functioning.

1 **II. The ALJ Properly Evaluated The Opinion Of The Consulting Physician.**

2

3 On February 7, 2012, Dr. Aida D. Cruz, a board eligible internist, performed a consultative

4 examination of plaintiff. (A.R. 338-43.) Dr. Cruz observed that plaintiff experienced "fine hand

5 tremors at rest," but she also found that plaintiff's "strength is 5/5 in all extremities," she has no

6 impairments in her sensation or reflexes, and she retains a full range of motion in her shoulders,

7 elbows, wrists, and hands. (*Id.* 341-42.) Dr. Cruz diagnosed plaintiff with hypertension (112/100)

8 and hand tremors. (*Id.* 342.) She opined that plaintiff is able to: "lift and carry 100 pounds

9 occasionally, and 50 pounds frequently[;] stand and walk for six hours per eight-hour workday,

10 and sit for six hours out of an eight-hour workday[;]" but she "is restricted from performing fine

11 and gross manipulation with both hands due to the tremors." (*Id.* 343.) Dr. Cruz assessed

12 plaintiff with no other functional limitations. (*Id.*)

13

14 With respect to Dr. Cruz's assessment, the ALJ wrote:

15

16 The consultative examiner at Exhibit 8F limited [plaintiff] to no fine or gross

17 manipulation due to her fine tremor, but there are no objective neurological findings

18 on examination; and it does not appear that she was ever worked up for her

19 tremors. Nevertheless, [plaintiff's] tremors were factored in the maximum residual

20 functional capacity assessment by reducing her to no more than occasional bilateral

21 fine hand manipulation.

22

23 (A.R. 15.)

24

25 Plaintiff contends that the ALJ erred, because he rejected Dr. Cruz's opinion that plaintiff

26 was limited in her ability to perform gross manipulation without adequate explanation. (Joint Stip.

27 at 12.) However, Dr. Cruz's opinion was contradicted by the opinion of Dr. Sean To, a board

28 eligible internist, who examined plaintiff on July 5, 2011. (A.R. 331.) Like Dr. Cruz, Dr. To noted

1 "mild resting tremors" in plaintiff's hands (*id.* 333) but found that these did not cause any
2 functional restrictions to plaintiff's ability to use her hands or engage in fine and gross
3 manipulation (*id.* 334). Accordingly, the ALJ was entitled to reject Dr. Cruz's assessment that
4 plaintiff was limited in her ability to engage in gross manipulation for "specific and legitimate
5 reasons" supported by substantial evidence. See Hill v. Astrue, 698 F.3d 1153, 1159-60 (9th Cir.
6 2012).

7
8 The ALJ was also entitled to reject Dr. Cruz's assessment based on the ALJ's determination
9 that Dr. Cruz's opinion was "brief, conclusory, and inadequately supported by clinical findings."
10 Bayliss v. Barnhart, 427 F.3d 1211, 1216 (9th Cir. 2005) (citing Tonapetyan v. Halter, 242 F.3d
11 1144, 1149 (9th Cir. 2001)); (*see also* A.R. 15, 17). The ALJ's assessment of Dr. Cruz's opinion
12 is correct. Dr. Cruz did not support her opinion with specific findings regarding plaintiff's ability
13 to engage in gross manipulation. To the contrary, as stated above, Dr. Cruz found that plaintiff
14 demonstrated normal strength and range of motion in her upper extremities, and she did not
15 observe plaintiff experience functional limitations resulting from her fine hand tremors.

16
17 There are also no other medical records that support Dr. Cruz's assessment. As stated
18 above, Dr. To identified no functional limitations related to plaintiff's hand tremors, and as the ALJ
19 observed, plaintiff was never "worked up" for her tremors. In addition, the statements of plaintiff
20 and the lay witnesses about plaintiff's abilities and daily activities are inconsistent with Dr. Cruz's
21 opinion. First, plaintiff did not allege that hand tremors -- or difficulty performing job duties
22 requiring gross manipulation -- resulted in her departure from her job as a teacher's aide (A.R.
23 31 (stating that she left because her concentration and ability to stay on task was "off")) or made
24 it difficult to find new employment (*id.* 51). Second, plaintiff's daily activities reveal that she is
25 able to perform activities requiring gross manipulation despite her hand tremors. Specifically,
26 plaintiff stated that she cooks sometimes, paints two to three times a week, does a load of laundry
27 now and then, goes grocery shopping, does the dishes, pulls weeds, and takes out the trash. (*Id.*
28 49, 241, 243.) Plaintiff indicated that she has trouble performing some of these activities due to

her mental impairments, *i.e.*, that she sometimes forgets to turn the stove off and tries to avoid shopping because she does not like crowds, but plaintiff indicated that she did not have any difficulty painting, pulling weeds, or performing her other daily activities due to her hand tremors except that she is “too shaky to use hot oil” while cooking. (*Id.*) The third party function reports completed by plaintiff’s boyfriend, Nicholas Gilland, and her friend, Steven Dey, similarly indicate that, although plaintiff’s hands shake, the tremors did not restrict her ability to perform activities requiring gross manipulation. (*Id.* 208-15 (Gilland’s report), 250-57 (Dey’s report).) Gilland stated that plaintiff: has no problem with any aspect of her personal care, including dressing, bathing, and caring for her hair (*id.* 209); shops by herself for paint, food, books, and “basic needs” (*id.* 211); and does the laundry, cleaning, and yard work without difficulties related to her hand tremors (*id.* 210). Dey similarly stated that plaintiff has no problem with any aspect of her personal care (*id.* 251) and washes the dishes, shops for food and cosmetics, paints, and takes out the trash without difficulties related to her hand tremors (*id.* 252-54).

In sum, the record does not support Dr. Cruz’s conclusory opinion that plaintiff is restricted from performing gross manipulation with both hands, and thus, the ALJ did not err in discounting Dr. Cruz’s opinion as conclusory and not supported by objective findings.

III. The ALJ Properly Relied On The VE’s Testimony That Plaintiff Could Perform The Occupations of Kitchen Helper, And Any Other Error At Step 5 Is Harmless.

A. Background

At step 5 of the sequential analysis, the ALJ is required to consider the potential occupations that the plaintiff may be able to perform given her RFC. In this case, the ALJ asked the VE whether jobs exist in the national or regional economies that could be performed by an individual with plaintiff’s age, education, and past work experience who is: limited to simple,

1 routine, repetitive tasks performed in a work environment free of production requirements and
2 involving only simple work related decisions; unable to climb ladders, ropes, or scaffolds;
3 precluded from exposure to unprotected heights; precluded from the use of moving hazardous
4 machinery; limited to superficial or no direct interaction with the public and only occasional
5 interaction with co-workers; and limited to occasional bilateral fine manipulation. (A.R. 55, 56,
6 57.) The VE opined that an individual meeting this description could perform jobs that exist in
7 significant numbers in the national and regional economies, including those of kitchen helper (DOT
8 318.687-010) with 10,000 jobs in the regional economy and 500,000 nationally, industrial cleaner
9 (DOT 381.687-018) with 6,000 jobs in the regional economy and 1.1 million nationally, and linen
10 room attendant (DOT 222.387-030) with 2,000 jobs in the regional economy and 350,000
11 nationally. (*Id.* 56-57.)
12

13 The ALJ determined that the VE's testimony was consistent with the information in the DOT
14 and, based on the VE's testimony, concluded that plaintiff was capable of making a successful
15 adjustment to other work that existed in significant numbers in the national economy. (A.R. 19.)
16 Plaintiff now contends that the ALJ erred in relying on the VE's testimony, because the VE's
17 testimony that plaintiff could perform the jobs of kitchen helper, industrial cleaner, and linen room
18 attendant was inconsistent with the DOT's descriptions of the duties and requirements of each of
19 those jobs. (*See* Joint Stip. at 3-8.) Specifically, plaintiff states that, according to the DOT, the
20 jobs of kitchen helper and industrial cleaner would expose plaintiff to hazardous moving machinery
21 (*id.* at 4-6) and the job of linen room attendant would require plaintiff to perform duties involving
22 Level Three Reasoning, which conflicts with plaintiff's limitation to "simple, routine, repetitive tasks
23 with simple work related decisions" (*id.* 6-8).
24

25 **B. Legal Standard**

26

27 In determining whether plaintiff can perform other work that exists in significant numbers
28 in the national economy, the ALJ relies on the Dictionary of Occupational Titles ("DOT"), "the

SSA's primary source of reliable job information," which describes the requirements for each listed occupation. Zavalin v. Colvin, 778 F.3d 842, 845-46 (9th Cir. 2015). The ALJ is also entitled to rely on the testimony of vocational experts who testify about specific occupations a plaintiff can perform in view of her residual functional capacity. *Id.* at 846; *see also* Bayliss, 427 F.3d at 1218 (ALJ may rely on "any reliable job information," including the testimony of a VE). However, when the ALJ hears VE testimony, Social Security Ruling 00-4p ("SSR 00-4p") requires her to ask the VE if the testimony provided conflicts with the information in the DOT and, if the VE's testimony "appears" to conflict with the DOT, to obtain a reasonable explanation for the conflict. SSR 00-4p; Massachi v. Astrue, 486 F.3d 1149, 1152-54 (9th Cir. 2007).

The ALJ may choose to accept testimony from a VE that contradicts the DOT, but only if the record contains "persuasive evidence to support the deviation." Tommasetti v. Astrue, 533 F.3d 1035, 1042 (9th Cir. 2008). When the ALJ fails to identify and resolve an apparent inconsistency, a court may find that the ALJ's decision is not supported by substantial evidence, *see, e.g.,* Zavalin, 778 F.3d at 846, or that the error is rendered harmless by either the absence of an actual conflict with the DOT or the VE's articulation of "sufficient support" for his conclusion, Massachi, 486 F.3d at 1154 n.19.

C . Analysis

The ALJ asked the VE if he understood "that if you give us an opinion which conflicts with the information in the Dictionary of Occupational Titles that you need to advise us of the conflict and the basis for your opinion," and the VE answered, "Yes, I will." (A.R. 54.) However, the VE identified no discrepancies between his testimony that plaintiff could perform the jobs of kitchen helper, industrial cleaner, and linen room attendant and the information in the DOT.

Although the ALJ may have erred in failing to identify and reconcile discrepancies between the DOT and the VE's testimony that plaintiff could perform the jobs of industrial cleaner and linen

1 room attendant, plaintiff has not persuaded the Court that a discrepancy exists between the DOT
2 and the VE's testimony that plaintiff could perform the job of kitchen helper. Furthermore,
3 because there are a significant number of kitchen helper jobs in the regional and national
4 economies (10,000 and 500,000 respectively), any error with respect to the ALJ's reliance on the
5 VE's testimony that plaintiff can perform the jobs of industrial cleaner and linen room attendant
6 is harmless, because it has no effect on the ultimate nondisability determination. See Carmickle,
7 533 F.3d at 1162.

8
9 According to the DOT, a kitchen helper "[p]erforms *any combination* of following duties to
10 maintain kitchen work areas and restaurant equipment and utensils in clean and orderly
11 condition":

12
13 Sweeps and mops floors. Washes worktables, walls, refrigerators, and meat blocks.
14 Segregates and removes trash and garbage and places it in designated containers.
15 Steam-cleans or hoses-out garbage cans. Sorts bottles, and breaks disposable ones
16 in bottle-crushing machine. Washes pots, pans, and trays by hand. Scrapes food
17 from dirty dishes and washes them by hand or places them in racks or on conveyor
18 to dishwashing machine. Polishes silver, using burnishing-machine tumbler,
19 chemical dip, buffing wheel, and hand cloth. Holds inverted glasses over revolving
20 brushes to clean inside surfaces. Transfers supplies and equipment between
21 storage and work areas by hand or by use of handtruck. Sets up banquet tables.
22 Washes and peels vegetables, using knife or peeling machine. Loads or unloads
23 trucks picking up or delivering supplies and food.

24
25 DOT 318.687-010 (emphasis added).

26
27 Plaintiff now contends that the job of kitchen helper would expose plaintiff to hazardous
28 machinery, because plaintiff could be asked to, *inter alia*, steam clean garbage cans, break

1 disposable bottles in a bottle crushing machine, place dirty dishes on a conveyor belt to a
2 dishwasher, use a burnishing-machine tumbler to polish silver, and peel vegetables with a peeling
3 machine. (Joint Stip. at 4-5.) Plaintiff offers no justification for her belief that a steam cleaner,
4 conveyor belt, dishwasher, and other machines that might be used by kitchen helper are
5 hazardous, and she identifies no potential hazards associated with using these machines. Instead,
6 plaintiff pins her argument on her own personal assessment of the perils of using the kitchen
7 equipment identified in the DOT's description of the kitchen helper position.

8
9 Plaintiff's personal opinion is not a reliable source of job information, and she cites no legal
10 authority for her contention that the Court should overlook the two designated sources of reliable
11 job information in this case -- the DOT and the VE's testimony -- in favor of her own subjective
12 beliefs. See 20 C.F.R. § 404.1566(d)-(e); Bayliss, 427 F.3d at 1218. Accordingly, plaintiff's
13 argument is devoid of merit, and the ALJ committed no error warranting reversal at step 5 of the
14 sequential analysis.

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CONCLUSION

For the reasons stated above, the Court finds that the Commissioner's decision is supported by substantial evidence and free from material legal error. Neither reversal of the ALJ's decision nor remand is warranted.

Accordingly, IT IS ORDERED that Judgment shall be entered affirming the decision of the Commissioner of the Social Security Administration.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of this Memorandum Opinion and Order and the Judgment on counsel for plaintiff and for defendant.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: May 18, 2015


MARGARET A. NAGLE
UNITED STATES MAGISTRATE JUDGE